RECEIVED
Apr 20 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Chief Administrative Law Judge

---

Case No. 17-ALJ-17-0060-CC
Appellant Case No. 2019-001933
Opinion No. 5972 (Filed March 1, 2013)

McEntire Produce, ...Respondent,

v.

South Carolina Department of Revenue, ...Appellant.

THE DEPARTMENT OF REVENUE'S RETURN TO PETITION FOR REHEARING

Elisabeth W. Shields
Associate Counsel
Jason P. Luther
Chief Legal Officer
300A Outlet Pointe Blvd.
Columbia, SC 29210
(803) 898-5576
Attorneys for Department of Revenue
Elisabeth.shields@dor.sc.gov

Columbia, South Carolina
April 20, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules:

Pursuant to Rules 221(a) and 240(e) of the South Carolina Appellate Court Rules, as well as the Court of Appeals' ("Court") letter dated April 10, 2023, the South Carolina Department of Revenue ("Department") submits this Return in opposition to the Petition for Rehearing filed by McEntire Produce, Inc. ("McEntire" or "Respondent"). Respondent is not entitled to a rehearing because it does not identify any substantive points of fact or law that the Court overlooked or misapprehended, but instead, repeats arguments previously considered by this Court. The Department respectfully requests that Respondent's Petition be denied.

STANDARD OF REVIEW

Rule 221(a), SCACR, requires a Petition for Rehearing to "state with particularity the points supposed to have been overlooked or misapprehended by the court." Importantly, "the purpose of a petition for rehearing is not to have presented points which lawyers for the losing parties have overlooked or misapprehended, and the purpose of a petition for rehearing is not just to have the case tried in this court a second time." Arnold v. Carolina Power & Light Co., 168 S.C. 163, 167 S.E. 234, 238 (1933).

ARGUMENT

The Respondent's Petition does not direct the Court "with particularity [to] the points supposed to have been overlooked or misapprehended by the court" in its March 1, 2023 opinion ("Opinion"). In fact, virtually all of the twenty-five pages of argument in Respondent's Petition are verbatim from either Respondent's Final Brief or from the Administrative Law Court's ("ALC") Final Order. In other words, the majority of Respondent's Petition for Rehearing is an echo of arguments already made and that this Court considered and rejected. Respondent has not raised any point that was not directly addressed by the Court's Opinion. The Petition should be denied.

Respondent's objections appear to be threefold: (1) the Court improperly substituted its own judgement for that of the ALC by finding that certain machines were not integral and necessary to the

manufacturing process; (2) the Court wrongly concluded that certain protective gear required to be worn by Respondent's employees under federal and state law are not exempt under the pollution control exemption; and (3) the Court incorrectly applied the integrated plant doctrine to the facts of this case. Each of these arguments was thoroughly briefed and argued before this Court[1], and this Court directly addressed and rejected these exact arguments when it properly reversed the ALC's decision in finding that the Respondent's purchases of certain supplies and protective clothing were subject to use tax for the tax periods between October 1, 2012 through September 30, 2015 ("Audit Period").

I. The Court did not violate S.C. Code Ann. § 1-23-610(b) because the questions presented to the Court were questions of law and not questions of fact.

Respondent asserts that the Court violated § 1-23-610(b) by substituting the factual findings made by the ALC with its own. (Petition pp. 2-3). This argument is flawed because the questions presented to the Court were not questions of fact but questions of law.

Respondent is seeking, and the ALC affirmed, a use tax exemption for certain supplies and protective clothing purchased during the Audit Period under the Machine Exemption and Pollution Control Machine Exemption, both found in S.C. Code Ann. § 12-36-2010(17). It is well settled that '[t]he language of a tax exemption statute must be given its plain, ordinary meaning and must be *strictly construed* against the claimed exemption." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E. 2d 471, 476 (1998) (emphasis added). Furthermore, the interpretation of a statute or construction of a regulation is a question of law for the Court to decide. See Hopper v. Terry Hunt Constr., 383 S.C. 310, 314, 680 S.E. 2d 1, 3 (2009); S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 725 S.E.2d 480, 483 (2012) (holding that the determination of whether certain facts

[1] The Department addressed the Respondent's improper standard of review (i.e., substantial evidence) in its Final Reply Brief (See Final Reply Brief of Appellant, pp. 1-2).

satisfy the language of a Department regulation is a question of law). Thus, interpreting sales tax exemptions and regulations is a question of law and such statutes are to be strictly construed *against* the claimed exemption. Sales tax statutes and regulations are questions of law and they are subject to *de novo* review by this Court without any deference to the ALC's conclusions. See State v. Whitner, 399 S.C. 547, 552, 732 S.E.2d 861, 863 (2012) (citing Transp. Ins. Co. & Flagstar Corp. v. S.C. Second Injury Fund, 389 S.C. 422, 427, 699 S.E.2d 687, 689 (2010); Catawba Indian Tribe of S.C. v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007)).

Contrary to what Respondent asserts in its Petition, the ALC's finding that certain machines were integral and necessary to the manufacturing process was not a factual finding. (Petition p. 3). Rather, the ALC made conclusions of law (albeit incorrect) when making these determinations (See R. pp. 18-40). Under the Administrative Procedures Act, this Court may properly reverse the ALC if it determines any ALC finding, conclusion, or decision violates statutory provisions or is affected by error of law. S.C. Code Ann. § 1-23-610(D). The fundamental error the ALC committed is that it improperly expanded the Machine Exemption and, by doing so, improperly expanded what it means to be "used in processing tangible personal property." Thus, this Court properly found there was an error of law when the ALC broadened the Machine Exemption beyond the statute's plain meaning. (Opinion pp. 13 and 17).

The remainder of this portion of Respondent's Petition (Petition pp. 4-21) simply regurgitates portions of the Record on Appeal, including the trial transcript and the ALC's Order, to support Respondent's argument that there was substantial evidence to support the ALC's findings. However, once again, these issues before the Court are not questions of fact— they are questions of law, which the Court properly considered and correctly reversed the ALC's decision. Because the Respondent

cannot demonstrate that this issue was one that was overlooked or misapprehended by the Court, this is not a proper ground on which to grant the Petition for Rehearing.[2]

II. The Court properly determined that the Respondent's purchases of protective clothing were not exempt under the Pollution Control Machine Exemption.

As with the Machine Exemption, the Petition merely re-argues Respondent's case for the exemption of protective clothing used at its facility under the Pollution Control Machine Exemption found in S.C. Code Ann. § 12-36-2120(17). (Petition pp. 21-23). As discussed above, this is not the purpose of a Petition for Rehearing and the Respondent has not demonstrated how the Court overlooked or misapprehended its arguments regarding the taxability of its purchases of protective clothing.

Respondent asserts that neither the Federal law nor the DHEC regulations that govern the Respondent's operations label the clothing required in Respondent's facility as "protective clothing." (Petition pp. 21-22). This does not matter— the Respondent is seeking an exemption from sales and use tax under the Pollution Control Machine Exemption on its purchases of the clothing it is required to have in its facility. Accordingly, because exemption statutes are strictly construed *against* the exemption, the Respondent must prove that the items it seeks to exempt fit squarely within the exemption statute. See TNS Mills at 618, 503 S.E.2d at 475. Respondent had to demonstrate that the clothing it sought to exempt were, in fact, machines, as the Pollution Control *Machine* Exemption applies to *machines*. Regulation 117-302.5(B)(10) states that protective clothing does not qualify as a

---

[2] Additionally, the Respondent again attempts to shift the burden to the Department by saying multiple times that the Department provided little to no evidence that the items in dispute were *not* exempt from tax. As the Department replied to this very assertion in its Final Reply Brief, the Department does not bear the burden in tax exemption cases to prove that something is *exempt* from tax. See Final Reply Brief of Appellant p. 2. Rather, "[t]he burden is on [the person seeking the exemption] to prove their right to an exemption by bringing themselves clearly within the conditions imposed by the statute." TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 618, 503 S.E.2d 471, 475 (1998) (referencing York County Fair Assoc. v. S.C. Tax Comm'n, 249 S.C. 337, 341, 154 S.E.2d 361, 363 (1967)).

"machine" for purposes of the exemptions in § 12-36-2120(17). Therefore, Respondent cannot place the clothing it seeks to exempt clearly within the exemption statute and the Court properly held these items as taxable.

The distinction Respondent attempts to make between protective clothing to protect workers versus protective clothing used to protect manufactured products is verbatim what Respondent argued in its Final Brief. (See Final Brief of Respondent p. 35). Similarly, the Department's Private Letter Rulings, Revenue Rulings, and Tax Commission Decisions the Respondent attempts to use to show an alleged inconsistency in the Department's interpretation of § 12-36-2120(17) were all provided throughout the Respondent's Final Brief.

III. The Court properly applied South Carolina law when it reversed the ALC's decision as opposed to relying on *Niagara Mohawk Power Corp. v. Wanamaker*, 286 A.D. 446 (N.Y. 1955).

Respondent states that while the ALC cited to the Niagara Mohawk decision, "it in no way relied on it." (Petition p. 23). The Department respectfully disagrees. The ALC's final order speaks for itself, in which the ALC found that machinery is exempt if it meets the test "derived from Niagara Mohawk . . . ." (R. pp. 0021-0022). By relying on this articulation of the Integrated Plant Theory in Niagara Mohawk— exempting items from sales tax so long as they contribute to the overall function and operations of the manufacturing plant— the ALC improperly broadened the Machine Exemption and exempted from use tax those items and supplies purchased by the Respondent which would otherwise be subject to tax under South Carolina law. (See R. pp. 0021-0022). As the Department explained in its Final Brief, this test is much broader and more inclusive than South Carolina's Machine Exemption. (See Final Brief of Appellant, p. 25). While South Carolina has recognized itself as an integrated plant theory state for purposes of the Machine Exemption (see Anonymous Corp. v. S.C. Dep't of Revenue, 1999 WL 1094323 (S.C. Admin. Law. Judge Div., November 9, 1999), aff'd S.C. Dept. of Revenue v. Springs Indus., Inc., 2003-UP-029 (Ct. App. 2003); and Anonymous Taxpayer v.

S.C Dep't of Revenue, Docket No. 02-ALJ-17-0350-CC (S.C. Admin. Law. Judge. Div. July 8, 2003)), it is limited by the Machine Exemption Regulation. When applied, the Machine Exemption Regulation limits the Machine Exemption to those items and materials which are actually involved in the production or processing of tangible personal property for sale.

This Court did not confuse the manufacturing process (Petition p. 4). Instead, it was the ALC that improperly broadened what the General Assembly intended to be the manufacturing process for purposes of the Machine Exemption.[3] The Machine Exemption Regulation makes clear that the exemption is only intended for those machines that are involved in the manufacturing of tangible personal property for sale. Consequently, any items that fall outside of the manufacturing process are not exempt, even if they are within a manufacturing facility and even if they contribute to the overall manufacturing operations.

Respondent is simply wrong when it states that "South Carolina law provides that so long as the equipment in question performs an essential function in the *taxpayer's manufacturing operations*, it will qualify for the machine exemption to the sales tax." (Petition p. 25) (emphasis added). Respondent made this same exact argument in its Final Brief (See Final Brief of Respondent p. 13) and this Court properly rejected this argument. The Machine Exemption Regulation clearly states that a machine qualifies for the exemption if "[t]he machine is used in, and serves as an essential and indispensable component part of the *manufacturing process* . . . ." 117-302.5(B)(1)(b) (emphasis added). A machine

---

[3] "All rules of statutory construction are subservient to the one that *legislative intent must prevail* if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute." Georgia-Carolina Bail Bonds, Inc. v. County of Aiken, 354 S.C. 18, 23, 579 S.E.2d 334, 336 (Ct. App. 2003) (emphasis added). The plain language of the Machine Exemption Regulation demonstrates that the legislature intended for certain items to *not* be exempt from sales and use taxes pursuant to the Machine Exemption, as these items fall outside of the actual manufacturing or processing of tangible personal property for sale. (See Regs. 117-302.5(B)(4)(a) (warehouse machinery); 117-302.5(B)(4)(b) (conveyances); 117-302.5(B)(6) (maintenance machines); 117-302.5(B)(7) (machines used for storage); 117-302.5(B)(9) (recordkeeping items); 117-302.5(C)(24) (machines used to condition air which are *not* used during the manufacturing process)).

that is essential to the "manufacturing operations" and not essential to the "manufacturing process" is simply a machine necessary to the manufacturer, which is not exempt from tax. (See 117-302.5(B)(1)(b)).

Respondent attempts to validate its position that anything that contributes to the overall manufacturing operation falls within the Machine Exemption by once again improperly relying on this Court's decision in Hercules Contractors & Engineers, Inc. v. S.C. Tax Comm'n, 280 S.C. 426, 313 S.E.2d 300 (Ct. App. 1984). However, the Department in its Final Brief, as well as this Court in its Opinion, clarified that the system as a whole in that case was deemed a "machine" in its entirety, so anything that contributed to or worked within the exempt "machine" was also exempt. (See Opinion pp. 7-8; Final Brief of Appellant pp. 10-11).

As with other arguments raised by Respondent in support of its Petition, this is a rehash of an argument that the Court considered and declined to follow. It is not proper support for a Petition for Rehearing.

CONCLUSION

Respondent did not raise a single point in its Petition for Rehearing that this Court did not explicitly consider and reject. The Petition for Rehearing should be limited, as required by the rule, to raising points that were either "overlooked or misapprehended by the Court." The Court certainly did not overlook any of Respondent's arguments, as the Court reiterated both the Department's arguments and Respondent's arguments throughout the Court's Opinion. As far as whether the Court substituted its own factual findings with those of the ALC, as demonstrated above, this argument is misplaced and should be rejected because the conclusions made by the ALC regarding whether the disputed items fit within the Machine Exemption and the Machine Exemption Regulation are questions of law, not fact, and can be considered *de novo* by this Court.

While Respondent may disagree with the Court's decision, it cannot assert that any argument was overlooked or misapprehended. Respondent's Petition for Rehearing is without foundation and should be denied.

Respectfully Submitted,

Elisabeth W. Shields (Bar No. 100784)
Jason P. Luther (Bar No. 78021)
300A Outlet Pointe Blvd.
Columbia, SC 29210
803-898-5576 (Tel.)
803-896-0171 (Fax)
Elisabeth.shields@dor.sc.gov
CourtOrders@dor.sc.gov

Attorneys for Appellant
South Carolina Department of Revenue

April 20, 2023
Columbia, South Carolina

RECEIVED
Apr 20 2023
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable H.W. Funderburk, Jr., Chief Administrative Law Judge

---

Case No. 17-ALJ-17-0060-CC
Appellate Case No. 2019-001933
Opinion No. Op. 5972 (Filed March l, 2013)

McEntire Produce, Inc., ... Respondent,

v.

South Carolina Department of Revenue,..... Appellant.

PROOF OF SERVICE

I certify that I have served the foregoing **Department of Revenue's Return to Petition for Rehearing** upon counsel listed below via electronic mail and U.S. Mail, postage pre-paid, at the address listed in the Attorney Information Section, on April 20, 2023, at the following address(es):

Burnet R. Maybank, III, Esquire
James Peter Rourke, Esquire
P.O. Drawer 2426
Columbia, SC 29202-2426
BMaybank@nexsenpruet.com
JRourke@nexsenpruet.com

Geneva J. McIntosh, Legal Assistant
South Carolina Department of Revenue

Columbia, South Carolina
April 20, 2023

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
OFFICE OF THE GENERAL COUNSEL

300A Outlet Pointe Blvd.
Columbia, SC 29210

Main Line: 803.898.5130
Facsimile: 803.896.0171

April 20, 2023

VIA US Mail and E-Mail – ctappfilings@sccourts.org
The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: McEntire Produce, Inc. vs. South Carolina Department of Revenue
Lower Court Case No. 2017-ALJ-17-0060-CC
Appellate Case No. 2019-001933
DOR File Number: 180220

Dear Ms. Kitchings:

Enclosed for filing please find the South Carolina Department of Revenue's Return to Petition for Rehearing in connection with the above referenced matter. Also enclosed is a Proof of Service.

Please do not hesitate to contact me at 803-898-5576 or Elisabeth.Shields@dor.sc.gov should you have any questions.

Sincerely,

OFFICE OF GENERAL COUNSEL

Elisabeth W. Shields, Esquire
Counsel for Litigation

EWS/gjm

Enclosures

c: Burnet R. Maybank, III, Esquire
James Peter Rourke, Esquire